Randell Warehouse of Arizona, Inc. *and* Sheetmetal Workers' International Association, Local 359, AFL–CIO, Petitioner. Case 28–RC–5274

July 27, 1999

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

This case presents the question whether the Petitioner-Union engaged in objectionable conduct by photographing the interaction of union representatives distributing literature outside the Employer's plant and employees either accepting or refusing the materials. For the reasons that follow, we shall overrule the Employer's objections and certify the Union.

Procedural Background

On April 5, 1995, Hearing Officer Lewis S. Harris issued the attached report recommending disposition of objections to, and determinative challenges in, an election held on February 3, 1995. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 40 for and 32 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.[1]

On June 12, 1996, the National Labor Relations Board issued a notice of hearing, scheduling for oral argument the issues raised in the Employer's Objection 2 concerning the Union's photographing of employees. On August 7, 1996, the Board heard oral argument in this case and in *Flamingo Hilton-Reno, Inc.*, Case 32–CA–14378.[2] The Employer, the Petitioner, and the following amici curiae all filed briefs and participated in the oral argument concerning the issues presented in this case: the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO); the Council on Labor Law Equality (COLLE); the Labor Policy Association; Overnite Transportation Company; and the International Brotherhood of Teamsters (Teamsters).

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings[3] and recommendations[4] only to the extent consistent with this decision.

Facts

The parties stipulated that prior to the election, union representatives took photographs of other union representatives distributing union literature outside the Employer's facility.[5] These photographs necessarily included both employees who accepted and those who rejected proffered literature, and potentially provided the Union with a means of learning the identity of employees. Employee Carlos Vasquez testified that when he asked one of the individuals distributing the fliers why the other person was taking pictures, he was told, "It's for the Union purpose, showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run." Vasquez also testified that he knew that this individual was "a representative from the Union" because he was with the individuals who were handing out leaflets.

The Hearing Officer's Report

The hearing officer found that the Union's photographing of employees reasonably tended to interfere with employee free choice. Citing *Pepsi-Cola Bottling Co.*, 289 NLRB 736 (1988), and *Mike Yurosek & Son, Inc.,* 292 NLRB 1074 (1989), the hearing officer stated that, "in the absence of a valid explanation, photographing employees by a union, amounts to objectionable conduct." Applying that standard, the hearing officer found no evidence that the Union ever communicated to employees the reason for the photographing. The hearing officer also found that, in any event, the explanation given, i.e., "it's for the Union purpose," was "hardly enough to comfort someone that the photographs might not be used for some other, possibly devious, purpose." Accordingly, the hearing officer recommended that the election be set aside.

Positions of the Parties and Amici

The Union argues that the photographing was not objectionable conduct. Initially, the Union contends that the Board should overrule *Pepsi-Cola Bottling* to the extent that it holds that union photographing is objectionable in

[1] The original tally of ballots showed 40 for and 32 against the Petitioner, with 25 determinative challenged ballots. At the hearing, the parties stipulated that 24 of the 25 challenged ballots were cast by employees who were ineligible to vote.

[2] On March 8, 1999, the Board issued an order in *Flamingo Hilton-Reno*, granting the joint motion of the respondent and the charging party to remand the proceeding to the Regional Director for processing of a non-Board settlement.

[3] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.,* 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[4] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Employer's Objections 1 and 3.

In its Objection 2, the Employer alleged: "Numerous acts of intimidation, including threats and implied threats by Union adherents and agents directed to eligible voters occurred prior to and during the day of the election." Among the alleged acts of intimidation to which the Employer referred was the Petitioner's photographing of the distribution of union literature outside the Employer's premises during the critical period. This allegation is discussed above. We adopt the hearing officer's finding that the other threats alleged in Objection 2 were not made by agents, representatives, or officers of the Union, and that they were not objectionable when measured by the Board's third-party standard.

[5] Apart from this stipulation, several employees testified that photographs were taken outside the Employer's facility on other occasions but were unable to identify the person taking the pictures. In light of our disposition of this case, we find it unnecessary to decide whether, as the Employer contends, the Union was responsible for these actions.

the absence of a legitimate explanation to employees. The Union also argues that, even under *Pepsi-Cola Bottling,* the photographing was not objectionable because the explanation "it's for the Union purpose" was shown, contrary to the hearing officer, to have been made by a union representative, and was sufficient to establish a legitimate purpose for the photographing.

The Employer generally contends that *Pepsi-Cola Bottling* and *Mike Yurosek & Son* were correctly decided and that the hearing officer correctly applied them to find that the Union's photographing of employees in this case was objectionable.

Amici AFL–CIO and Teamsters argue that *Pepsi-Cola Bottling* and its progeny should be overruled and that the Board should find that union photographing is objectionable only if accompanied by threats to employees. In the view of these amici, the standard set forth in *Pepsi-Cola Bottling* is inconsistent with the organizational role played by unions under the Act and with precedent establishing that unions may engage in conduct that would be considered objectionable interrogation or surveillance if engaged in by employers.

Amici COLLE, LPA, and Overnite Transportation urge the Board to apply the same standard to union and employer photographing of employees because, in their view, employers and unions are equally capable of coercing employees. These amici assert that *Pepsi-Cola Bottling* was correctly decided and that the hearing officer correctly found that the Union's photographing of employees was objectionable under that standard.

Analysis

In *Pepsi-Cola Bottling,* the Board sustained an objection to an election based on the union's videotaping of employees being handed union leaflets as they were exiting the employer's premises during a union rally held the day before the election in front of the employer's plant. No one ever explained the purpose of the videotaping, either at the rally or at the hearing. The Board concluded on these facts that the videotaping

> intruded on the employees' Section 7 right to refrain from any or all union activities, including the union rally then in progress. Absent any legitimate explanation from the Union, we find that employees could reasonably believe that the Union was contemplating some future reprisals against them.

289 NLRB at 737.[6]

Subsequently, in *Mike Yurosek & Son, Inc.,* the Board applied *Pepsi-Cola* to find objectionable the union's photographing of prounion and antiunion employees' campaign activities in front of the plant gate. The union representative testified at the hearing that the pictures were taken because the subjects wanted to be photographed and to keep a record of antiunion activities in the event the union subsequently filed election objections or unfair labor practice charges. However, during the course of the election campaign, a union representative told a known antiunion employee that "we've got it on film; we know who you guys are . . . after the Union wins the election some of you may not be here." The Board found the photographing objectionable, noting that "no explanation was provided to employees while pictures were being taken to assuage their fears that the pictures would be the basis for future reprisals," and that the union representative's remarks were arguably threatening. 292 NLRB 1074.

In contrast, the Board found that union photographing of employees at a union-sponsored picnic was not objectionable in *Nu Skin International,* 307 NLRB 223 (1992). The situs of the photographing was a picnic which employees voluntarily attended (rather than the plant entrance as in *Pepsi-Cola* and *Mike Yurosek*) and union representatives had explained at the picnic that the photographs would be used as mementos and sent to a newspaper for publicity. (In fact, the union distributed copies of the photographs to employees after the election and sent them to the union's newspaper.) Under these circumstances, the Board found that the photographing was "innocuous and entirely distinguishable from that in *Pepsi-Cola* and *Mike Yurosek.*"

On further consideration, we have concluded that the standard for union photographing of employees in a preelection setting established by *Pepsi-Cola Bottling* is inconsistent with Board law involving union inquiry into employees' sentiments respecting representation. *Pepsi-Cola*'s general prohibition against making a visual record of employees' reactions to proffered union literature cannot be reconciled with Board and court cases permitting unions to ask employees directly whether they support the union, to attempt to persuade employees to sign petitions in support of representation, and to record the employees' responses. See *Springfield Hospital*, 281 NLRB 643, 692–693 (1986) (overruling employer's objection that union coerced employees by asking them whether they were for or against union and recording responses on charts, in the absence of threats of reprisal), enfd. 899 F.2d 1305 (2d Cir. 1990); *Kusan Mfg. Co*., 267 NLRB 740 (1983) (overruling employer's objection that union interfered with the election by soliciting employees to sign a prounion petition, by circulating the petition, and by distributing copies of the petition, in the absence of threats of reprisal), enfd. 749 F.2d 362 (6th Cir. 1984); *J. C. Penny Food Department,* 195 NLRB 921 fn. 4 (1972) (overruling employer's objection that union interfered with the election by polling employees as to how they were going to vote in the election, in the absence of coercion), enfd. 82 LRRM 2173 (7th Cir. 1972), followed in *Melrose-Wakefield Hospital v. NLRB*, 615 F.2d 563, 569

[6] The Board also noted that word of the videotaping incident was disseminated and that the election was very close (28 for and 26 against the union).

(1st Cir. 1980). The Board has also found that a union did not interfere with employee free choice when it asked prounion employees to report to the union the activities of coworkers who were assisting management during the election campaign. *Mercy-Memorial Hospital,* 279 NLRB 360 (1986), affd. in the summary judgment proceeding, 282 NLRB 5 (1986), enfd. sub nom. *NLRB v. Mercy-Memorial Hospital Corp.,* 836 F.2d 1022 (6th Cir. 1988).[7]

In recognizing that it is not objectionable for unions to ask employees if they support the union and record the employees' views, these cases reflect the role played by unions under the Act in "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. Indeed, the Supreme Court has recognized that Section 7's protection of employees' right of self-organization legitimates a union's efforts to communicate with employees, because "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 113 (1956). Unions, of course, may ask employees to sign authorization cards or some other record of support and, indeed, a union must submit evidence of such support before it may invoke the Board's election machinery—the formal mechanism by which employees' preferences are determined.[8]

As the Petitioner and some amici have noted, there are many legitimate reasons why a union would photograph employees in the course of an organizing campaign. Amicus AFL–CIO notes that such photographs may aid in the direction and deployment of union staff, may be used for campaign literature, or may be used to identify potential supporters among employees who union agents do not know by name. Amicus Teamsters notes that unions may photograph employees to demonstrate to workers that the union is on the scene and active in the campaign, to gauge the extent of its support among the employees, and to identify supporters and potential supporters. Finally, the Petitioner notes that, because unions do not have access to the employer's premises, they often must organize by using covert means and by soliciting the involvement of sympathetic employees.

Commentators have similarly observed that identifying potential supporters is a crucial initial step in an organizing campaign, one that often must be undertaken prior to the filing of a petition and receipt of an *Excelsior* list of employee names and addresses. Gagala, *Union Organizing and Staying Organized* (1983) at 149, 157. See also Craft and Extejt, "New Strategies in Union Organizing," Journal of Labor Research Vol. 4, 1 (Winter 1983) at 20 (personalized, face-to-face contact is essence of traditional organizing campaign).

In sum, photographing employees during an organizational campaign is one means by which unions can determine the identity and leanings of employees and carry out their legitimate objective of attaining majority support.

We find no objective or principled basis for distinguishing between asking an employee to sign an authorization card and recording the employee's response in documentary form, on the one hand, and making a visual record of the employee's response through videotaping or photography on the other. We therefore overrule *Pepsi-Cola* and reject its premise that union photographing or videotaping of employees engaged in protected activities during an election campaign, without more, necessarily interferes with employee free choice.[9]

We do not, however, overrule *Mike Yurosek* because we would reach the same result today on the facts presented there. In contrast to *Pepsi-Cola*, where the union's videotaping was not accompanied by any threats or other coercive conduct, in the *Mike Yurosek* case, a union representative told an antiunion activist that "we've got it on film; we know who you guys are . . . after the Union wins the election some of you may not be here." As former Member Higgins pointed out in *Mike Yurosek*, "the photographing of antiunion employees accompanied by this statement could reasonably put employees in fear that the pictures would be used for future reprisals and was therefore objectionable." 292 NLRB at 1074 fn. 5. Significantly, no threats of this character, attributable to the Union, are present in the instant case.

We recognize that, in contrast to our holding here, the Board has found, with court approval, that, absent proper justification, *employer* photographing or videotaping of employees engaged in protected activities is unlawful "because it has a tendency to intimidate." *F. W. Woolworth Co.,* 310 NLRB 1197 (1993) (employer photographing and videotaping of employees handing out leaf-

[7] See also *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992), in which union organizers recorded the license plate numbers of cars parked in the employee parking lot and, with the cooperation of the state department of motor vehicles, secured employee names and addresses. Based on this information, the union sent mailings to employees' homes; it also attempted to contact employees by phone or home visits. Id. at 530. In its opinion, the Supreme Court cited the "union's success in contacting a substantial percentage of [employees] directly, via mailings, phone calls, and home visits" as evidence that the union had reasonable alternative means of reaching employees short of trespass on the employer's property. Id. at 540. Thus, the Court implicitly approved the methods of communications that the union used.

[8] Under Sec. 9(c)(1)(A) of the Act, a representation petition must be supported by "a substantial number of employees." The Board defines "substantial" to mean at least 30 percent. See Sec. 101.18(a) of the Board's Statements of Procedure. The most commonly submitted evidence of support consists of signed authorization cards.

[9] This case does not involve photographing of employees in connection with picket line activities, and we express no opinion as to the coercive nature of photographing by a union under those circumstances.

lets in front of store unlawful).[10] The Board and the courts, however, have long applied differing standards to certain types of employer and union conduct during election campaigns in recognition of the fundamental fact that an employer, unlike a union, has virtually absolute control over employees' terms and conditions of employment. Consequently, there is no merit in the contention that it is inequitable and inconsistent for the Board to permit unions to photograph employees being offered campaign literature, while barring the same conduct by employers.

For example, an employer is generally prohibited from visiting the homes of its employees for the purpose of campaigning against the union. *Peoria Plastic Co.,* 117 NLRB 545 (1957). Home visits by union representatives, however, are unobjectionable so long as they are unaccompanied by threats or other coercive conduct. *Canton, Carp's, Inc*., 127 NLRB 513 fn. 3 (1960). Indeed, the Board's landmark decision in *Excelsior Underwear*, 156 NLRB 1236, 1244, 1246 fn. 27 (1966), expressly contemplates that unions will visit employees in their homes. The rationale for the Board's disparate treatment of similar employer and union conduct was well set forth in *Plant City Welding*, as follows:[11]

> [T]here is a substantial difference between the employment of the technique of individual interviews by employers on the one hand and by unions on the other. Unlike employers, unions often do not have the opportunity to address employees in assembled or informal groups, and never have the position of control over tenure of employment and working conditions which imparts the coercive effect to systematic individual interviews conducted by employers. Thus, not only do unions have more need to seek out individual employees to present their views, but, more important, lack the relationship with the employees to interfere with their choice of representatives thereby.

Polling is another area of the law in which employers and unions are held to different standards. Thus, it is well established that an employer may not conduct a preelection poll of its employees. See *Offner Electronics*, 127 NLRB 991 (1960).[12] On the other hand, a "union engaged in organizing employees may legitimately measure its support among the work force." *Glamorise Foundations*, 197 NLRB 729 (1972), citing *J. C. Penny Food Department*, supra. The Board's policy of treating the two types of polling differently was endorsed by the Sixth Circuit in *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362 (6th Cir. 1984). Although the employer contended that "what is sauce for the goose is sauce for the gander," the court was not persuaded, stating : "By no stretch of the imagination are employers of unorganized workers and unions seeking to organize those workers equally matched with respect to their powers of or opportunities for the exercise of coercion. . . . . This disparity between the disruptive powers of the employer and those of the union convinces us that pre-election polling by the union is not impermissible per se." 749 F.2d at 364–365.

Kusan was recently followed by the Sixth Circuit in *Maremont Corp. v. NLRB*, 177 F.3d 573 (6th Cir. 1999). The court stated that it agreed with the holding in *Kusan* that "although pre-election polling by an employer is per se objectionable, a union seeking to represent employees has a different relationship to them that makes pre-election polling less coercive." 177 F.3d 577.

The Seventh Circuit reached the same conclusion in *Louis-Allis Co. v. NLRB*, 463 F.2d 512 (7th Cir. 1972). The court rejected the employer's argument that because employer polling is coercive, union polling is likewise coercive. "The employer occupies a far different position with regard to the coercive impact of its actions upon employees than does a Union. The Board, recognizing this difference, has frequently applied different standards to the actions of the employer than it has to similar actions of unions." 463 F.2d at 517. The court quoted with approval from the Fifth Circuit's decision in *NLRB v. Golden Age Beverage Co.,* 415 F.2d 26, 30 (5th Cir. 1969), as follows: "An employer in an unorganized plant, with his almost absolute control over employment, wages, and working conditions, occupies a totally different position in a representation contest than a union, which is merely an outsider seeking entrance to the plant."

Similarly, in evaluating the potential coercive impact of employer speech, the Supreme Court has stressed that

> [a]ny assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of employees to associate freely, as those rights are embodied in § 7 and protected by § 8 (a)(1) and the proviso to § 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the lat-

[10] In *F. W. Woolworth,* the Board reaffirmed prior cases holding that "photographing in the mere belief that something 'might' happen does not justify Respondent's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity." 310 NLRB at 1197. In 1998, three courts of appeals cited *F. W. Woolworth* with approval and followed its sound principles. *Clock Electric v. NLRB,* 162 F.3d 907 (6th Cir. 1998); *National Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268 (D.C. Cir. 1998); and *California Acrylic Industries v. NLRB,* 150 F.3d 1095 (9th Cir. 1998).

[11] *Plant City Welding & Tank Co*., 119 NLRB 131, 133–134 (1957), revd. on other grounds 133 NLRB 1092 (1961).

[12] See also *Struksnes Construction Co*., 165 NLRB 1062, 1063 (1967) ("[A] poll taken while a petition for a Board election is pending does not, in our view, serve any legitimate interest of the employer that would not be better served by the forthcoming Board election. In accord with long-established Board policy, therefore, such polls will continue to be found violative of Section 8(a)(1) of the Act.").

> ter that might be more readily dismissed by a more disinterested ear.

NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969). Again, no such relationship of economic dependency exists between a union and the employees it seeks to represent.

For all of the above reasons, we conclude that the Union's conduct, in photographing employees during the distribution of union literature outside the Employer's premises, absent evidence of any express or implied threats or of other coercion, was not objectionable. Therefore, we need not examine the adequacy of the Union's explanation for its conduct. Accordingly, we shall overrule Objection 2 and certify that the Union is the representative of the unit employees.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Sheetmetal Workers' International Association, Local No. 359, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> INCLUDED: All probationary employees beginning ninety (90) consecutive calendar days after being hired by Randell and all regular employees who are assemblers, janitors, hourly maintenance, shippers, and craters, stampers and shearers and warehouse persons employed by the Employer in Tucson, Arizona.
>
> EXCLUDED: All supervisors, employees occupying positions of a labor relations confidential nature, salaried employees, temporary employees, employees designated as managerial trainees, secretaries and office clerical employees, guards, managers, administrators and executives.

MEMBER BRAME, concurring in the result.

The case before us raises two questions. The first is whether photographing or videotaping participants in the course of protected activity is so unusual and threatening that it is prima facie, or per se, objectionable (or unlawful). My colleagues properly answer "no" to this question. The second is whether the Board may nevertheless prohibit one party—the employer—from photographing such activity without an affirmative justification of its conduct. Lacking any reasoned basis, my colleagues answer "yes" to this question

In overruling existing case law prohibiting labor organizations from photographing or videotaping employees involved in activities protected by the Act without offering the employees a "legitimate explanation" for so doing, *Pepsi-Cola Bottling Co. of Los Angeles*, 289 NLRB 736, 737 (1988), my colleagues recognize that the act of photographing is not inherently coercive. Notwithstanding, they simultaneously hold that the identical conduct when engaged in by an employer is presumptively coercive and refuse likewise to overrule *F. W. Woolworth Co.*, 310 NLRB 1197 (1993) (prohibiting employers from photographing or videotaping protected activity without "proper justification."). As I believe the Board must treat like conduct identically, I join with my colleagues in overruling *Pepsi-Cola*, but cannot acquiesce in their refusal to abandon *F. W. Woolworth*.

In the context of this case, I join with my colleagues in overruling the Employer's objections to an election held February 3, 1995, among employees who work in a warehouse facility in Tucson, and who voted for representation by the Petitioner by a margin of 40 to 32 votes. Thus, I agree that Petitioner is entitled to certification as the collective-bargaining agent of those in the stipulated unit.

The Employer's second objection to the election asserted that, "Numerous acts of intimidation, including threats and implied threats by Union adherents and agents directed to eligible voters occurred prior to and during the day of the election. Such acts and threats created an atmosphere of coercion and intimidation which, reasonably, tended to interfere with the free and uncoerced choice of the employees." The Regional Director directed a hearing. The hearing officer found merit in the objection only to the extent the Employer adduced evidence that related to the photographing of employees by union representatives.[1] I agree with the hearing officer and my colleagues that other evidence presented in support of the objection does not form a basis for overturning the election.

I. FACTS

The facts are concise and may be taken verbatim from the report of the hearing officer:

> The parties stipulated that prior to the election, Union representatives took photographic pictures of Union representatives distributing Union literature outside of the Employer's plant. Several employees testified, [sic] that a person with a camera aimed the camera at their persons or their vehicles when they were exiting the Employer's property while other individuals were distributing Union flyers. There is no evidence that the Union ever communicated to employees the reason for the use of a photographic camera at those times. Employee Carlos Velazquez testified that he asked one of the individuals distributing flyers why the other person was taking pictures. Velazquez testified that he was told: "It's for the Union purpose, showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run."

As to this statement, the hearing officer commented: "This not so clear explanation is hardly enough to com-

[1] No exceptions were filed by the Employer to the hearing officer's recommendation that its Objections 1 and 3 be overruled.

fort someone that the photographs might not be used for some other, possibly devious, purpose."

Based on this evidence, the hearing officer properly recommended sustaining the objection under Board law as it existed until today:

> The Board has held that, in the absence of a valid explanation, photographing of employees by a union, amounts to objectionable conduct. *Mike Yurosek & Son, Inc.*, 292 NLRB 1074 (1989). The Board has also found that the unexplained videotaping of employees as they exited the employer's plant and were handed union leaflets warranted the setting aside of an election and directing a new one. *Pepsi-Cola Bottling Co. of Los Angeles*, 289 NLRB 736 (1988). The Board found in *Pepsi-Cola*:
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> > Absent any legitimate explanation from the Union, we find that employees could reasonably believe that the Union was contemplating some future reprisals against them. Clearly, such conduct would be intimidating and would reasonably tend to interfere with employee free choice in the election.

II. ANALYSIS

My colleagues propose that different legal standards be applied to photographing and videotaping, depending on whether the conduct is engaged in by an employer or a union. I cannot agree. Instead, a uniform standard should be followed, whether the photographing occurs in representation or unfair labor practice cases, whether it arises in organizing, strike, or picketing situations, and whether it is carried out by an employer or a union. In my view, such a standard, systematically applied, will protect employees from intimidation without unduly restricting employers or labor organizations from conduct that does not reasonably tend to intimidate.

A. General Legal Standards

Before detailed analysis, however, a few observations are in order concerning legal standards governing conduct in issue in representation and unfair labor practice proceedings. Where a representation objection is filed asserting that the "laboratory conditions," under which Board elections are to be held,[2] have been violated by a *party* to an election, the decisional standard is whether the "conduct reasonably tends to interfere with the employees' free and uncoerced choice in the election."[3] In an unfair labor practice proceeding, the question, regarding employer conduct, is whether it may reasonably tend "to interfere with, restrain, or coerce,"[4] or, regarding union conduct, whether it may reasonably tend to "restrain or coerce,"[5] employees exercising rights secured by Section 7 of the Act.[6] While declaring that alleged misconduct need not be judged by the same criteria in representation and unfair labor practice proceedings, the Board has acknowledged that "the result will ordinarily be the same."[7] As shown below, whether photographing or videotaping is alleged as objectionable or as an unfair labor practice by an employer or a union, the ultimate issue is whether the conduct may reasonably tend to instill a fear of reprisal in the minds of employees; accordingly, depending how the evidence is assessed, either standard is satisfied or neither is.

B. Photographing and Videotaping

The Board has not been a model of consistency or symmetry in developing precedent to control cases in which issues relating to photographing or videotaping arise, and courts of appeal have taken different approaches to addressing the problem.

1. Employer photographing

Most cases have involved employer conduct. Historically, in the Board's view, "An employer that photographs or videotapes employees engaged in concerted activities may engage in prohibited surveillance, or may unlawfully create the impression of surveillance, or both."[8] The pivotal question, however, is whether such activity is per se,[9] or presumptively,[10] unlawful (or objectionable), unless the employer provides "proper" or "legitimate" justification, or whether the conduct must be judged "in the circumstances"[11] without reliance on a rule that shifts the burden of persuasion from the General Counsel or objecting party to the other side. On this point, the Board has generally followed the former view, though not without vacillation. As in my opinion this position is flawed, I would abandon it and substitute the "in the circumstances" approach, aided by the application of flexible criteria for making judgments in varying contexts.

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[2] *General Shoe Corp.*, 77 NLRB 124, 127 (1948).

[3] *Pepsi-Cola Bottling Co*., supra, 289 NLRB at 736.

[4] *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946).

[5] *Operating Engineers Local 542 v. NLRB*, 328 F.2d 850, 852–853 (3d Cir. 1964), cert. denied 379 U.S. 826 (1964).

[6] In pertinent part, Sec. 7 provides that

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . . .

[7] *General Shoe*, supra, 77 NLRB at 127.

[8] I Hardin, *The Developing Labor Law* 129 (3d ed. 1991), and cases cited therein at 129–130.

[9] *U.S. Steel Corp. v. NLRB*, 682 F.2d 98, 101 (3d Cir. 1982) (referring to "Board's *per se* doctrine").

[10] I Hardin, *The Developing Labor Law,* supra, 129 ("[T]he Board presum[es] that the photographing of peaceful protected activity violates section 8(a)(1), but it allows the employer to rebut the presumption by proof of specific justifying circumstances." [Footnote omitted])

[11] *U.S. Steel Corp. v. NLRB*, supra, 682 F.2d at 101.

In an early case, *May Department Stores Co.*,[12] the Board found unlawful the Respondent's taking of motion picture and still photographs of union organizers distributing handbills to employees, and subsequently of employees and union members picketing, in front of its store. But the Board applied no presumptions, finding instead that the purpose of the conduct was to seek "police aid for the sole purpose of having the police interfere with the normal activities of the union."[13] Eight years later, citing *May*, the Board found a violation where an employer took photographs of union leaflet distribution and picketing outside its plant. *Radio Industries, Inc.*[14] The Board did not speak explicitly in terms of an antecedent requirement that the employer justify the action. But the Board did reject the employer's contention that it had the right to take precautions against "'situations that might be considered not peaceful,'" since pictures were taken only of peaceful activity which would not support an application for a court injunction.[15]

In *Hudson Hosiery Co.*[16] the Board was careful to tie to the circumstances its finding of a violation of Section 8(a)(1), where a supervisor photographed strikers patrolling in front of the plant. "[T]he only meaning the employees could read into the conspicuous filming of their peaceful picket lines by management officials, when they at the same time heard the admonitions of Supervisor Grimm [that their jobs were in jeopardy from their strike activity], was that the Respondent, after identifying and warning them, would probably discharge them if they did not immediately cease their strike."[17]

Following these early cases, the Board regularly presumed employer photographing to be unlawful. See, e.g., *Preston Feed Corp.*[18] (photographing of peaceful pickets constitutes unlawful surveillance absent explanation or justification);[19] *Flambeau Plastics Corp.*[20] ("It is clear that an employer has no right to take pictures of peaceful picketing of his premises in a lawful strike engaged in by his employees . . . absent a showing of justification or valid explanation for such actions."); *Glomac Plastics, Inc.*[21] ("[A]bsent unusual circumstances, it constitutes unlawful surveillance of protected concerted activities for an employer to photograph his employees' peaceful picketing."); *U.S. Steel Corp.*,[22] ("[A]bsent legitimate justification, an employer's photographing of its employees while they are engaged in protected concerted activity constitutes unlawful surveillance."); *Waco, Inc.*,[23] ("' [I]n the absence of proper justification, the photographing of pickets violates the Act because it has a tendency to intimidate.' Photographing lawful, peaceful picketing tends to implant fear of future reprisals." [Footnote citations omitted.])

In 1992, however, the Board reversed course, rejecting a judge's reliance on the principle that an employer violates Section 8(a)(1) by photographing employees engaged in protected concerted activity absent legitimate justification. *Sunbelt Mfg., Inc.*[24] Rather, where an employer videotaped organizational handbilling of employees at the plant's front gate, the Board ruled that,

> It is a reasonable tendency under the circumstances which governs the inquiry in each case. Here, the Respondent's videotaping at the culmination of the election campaign, during which we have found that the Respondent unlawfully expressed antiunion animus by threatening to close the plant and reduce wages and unlawfully discharged a known union adherent, specifically revealed whether certain employees accepted or rejected campaign literature. In these circumstances, even though some employees actively sought publicity as a memento, this purpose had not been explained to other employees, and we find that the Respondent's videotaping *reasonably* tended to interfere with, restrain, and coerce employees in the exercise of Sec. 7 rights. [Emphasis in original].[25]

[12] 59 NLRB 976, 1010–1011 (1944), modified on other grounds 154 F.2d 533 (8th Cir. 1946), cert. denied 329 U.S. 725 (1946).

[13] Id. at 1011.

[14] 101 NLRB 912 (1952).

[15] Id. at 925.

[16] 109 NLRB 1410 (1954).

[17] Id. at 1411. Two dissenters in *Hudson* disagreed that Grimm's remarks amounted to threats, and argued forcefully against finding illegal the "mere taking of pictures":

> The vice inherent in "surveillance" derives essentially from the intimidatory or coercive effect of employer spying on its employees' concerted activities, which are not normally freely open to the employer's observation. Here the activity in which the employees were engaged, a picket line, was from its very inception necessarily and completely public, open to observation from every source, and, by reason of its very purpose, was intended to be observed by anyone, including the public at large and the employer. Id. at 1414.

[18] 134 NLRB 629, 643 (1961), enfd. 309 F.2d 346 (4th Cir. 1962).

[19] But see, *Tennessee Packers, Inc.*, 124 NLRB 1117, 1123 (1959) (violation found because "[t]he taking of pictures by an employer, *who is known to be adverse to the unionization of its employees and has threatened to close its plant*, of its employees while engaged in union activities; to wit, receiving union literature of union organizers, necessarily has a normal and natural tendency to create fear and consternation in the hypothetical reasonable employee that the employer is recording, for some present or future course of action involving him, an act of that employee's which that employee knows to be displeasing to the employer.") [Emphasis added.]; *Hilton Mobile Homes*, 155 NLRB 873, 874 (1965), modified on other grounds 387 F.2d 7 (8th Cir. 1967) (motion picture photographing not violative of Sec. 8(a)(1) "in all the circumstances," including absence of threats or actual reprisal).

[20] 167 NLRB 735, 743 (1967), enfd. 401 F.2d 128 (7th Cir. 1968), cert. denied 393 U.S. 1019 (1969).

[21] 234 NLRB 1309, 1320 (1978), remanded 592 F.2d 94 (2d Cir. 1979), supplemental decision 241 NLRB 348 (1979), enfd. 600 F.2d 3 (2d Cir. 1979).

[22] 255 NLRB 1338 (1981), enf. denied 682 F.2d 98 (3d Cir. 1982).

[23] 273 NLRB 746, 747 (1984).

[24] 308 NLRB 780 fn. 3, enfd. in part 996 F.2d 305 (5th Cir. 1993) (table) (cited with approval in *K-Mart Corp. v. NLRB*, 62 F.3d 209, 212 (7th Cir. 1995), supplemental decision 322 NLRB 1014 (1997), enfd. 125 F.3d 572 (7th Cir. 1997)).

[25] Id.

Having set forth this declaration of the governing law, the Board, indeed the same three member panel of the Board, sub silentio overruled it less than 9 months later in *F. W.Woolworth Co.*, supra, 310 NLRB 1197 (1993), and revived the presumption that employer photographing and videotaping (in this case of off-duty employees who handbilled potential customers near store entrances to urge them to boycott the store during a labor dispute) is unlawful without "proper justification." The Board declined to follow the Third Circuit's opinion in *U. S. Steel Corp. v. NLRB*, 682 F.2d 98, supra, discussed hereafter, which had rejected the Board's presumptive approach to deciding photographing cases and followed the "in the circumstances" test.[26] The Board has also construed narrowly the "legitimate" or "proper" justification that an employer must provide to escape a finding of unlawful photographing or videotaping.[27]

2. Union photographing

By contrast, in recent years, the Board has treated union photographing differently depending upon whether an unfair labor practice or representation proceeding is involved, albeit without supplying any rationale for the distinction.

Where union photographing is alleged to violate Section 8(b)(1)(A), the Board has utilized an "all the circumstances" approach. "[T]he photographing of employees by pickets . . . is not by itself violative of Section 8(b)(1)(A) of the Act. It is only when such conduct takes place in conjunction with other actions indicating that a union might react adversely to employees who honor a picket line that such conduct exceeds the boundaries of permissible action." *Interstate Cigar Co.*[28] Accord: *Local Joint Executive Board of Las Vegas (Casino Royale, Inc.)*[29] (8(b)(1)(A) violation where union actually or apparently videotaped employee working during picketing and where conduct accompanied by abusive remarks); *Auto Workers of America, Local 695 (T. B. Wood's Sons Co.)*[30] ((8)(b)(1)(A) violation where, in context of numerous, severe independent unfair labor practices, apparent photographing or videotaping of occupants of vehicles as they crossed picket line showed conduct was undertaken "as a means of instilling fear of retribution in the minds of replacement workers and/or others who did not support the strike").[31]

Until today, the Board had treated union photographing or videotaping in representation cases identically with employer conduct, to wit, as presumptive grounds for setting aside an election. In *Pepsi-Cola Bottling Co.,* supra, 289 NLRB 736, a union official videotaped employees during a rally it held for 2 hours in front of the employer's plant the day before the election, including employees who were handed union literature as they left the premises. In setting aside the election, the Board concluded that, "Absent any legitimate explanation from the Union, we find that employees could reasonably believe that the union was contemplating some future reprisals against them. Clearly, such conduct would be intimidating and would reasonably tend to interfere with employee free choice in the election." Id. at 737. Likewise, in *Mike Yurosek & Son, Inc.*, 292 NLRB 1074 (1989), the Board relied on *Pepsi-Cola* to overturn an election where a union agent photographed campaign activity at the employer's front gate "[v]irtually everyday during the campaign." The Board emphasized that, as in *Pepsi-Cola*, "no explanation was provided to employees while pictures were being taken to assuage their fears that the pictures would be the basis for future reprisals." Id.[32]

[26] Since 1993, the Board appears to have held steady in applying the *per se* formula to employer photographing of protected concerted activity. See *Dilling Mechanical Contractors, Inc.*, 318 NLRB 1140, 1150 (1995), enfd. 107 F.3d 521 (7th Cir. 1997), cert. denied 118 S.Ct. 165 (1997); *Casa San Miguel, Inc.*, 320 NLRB 534, 538 (1995); *Sonoma Mission Inn*, 322 NLRB 898, 902 (1997).

[27] Most cases of employer photographing involve picket line activity at a company facility. The Board has held that "[A]n employer may photograph strikers who are engaged in violence rather than peaceful picketing, in order to obtain or preserve evidence in connection with an application for an injunction," *Gopher Aviation*, *Inc.,* 160 NLRB 1698, 1717 (1966), enf. denied, 402 F.2d 176, 183–184 (8th Cir. 1968); *Hilton Mobile Homes,* supra, 155 NLRB 873, 874 (1965), modified on other grounds 387 F.2d 7 (8th Cir. 1967) (no violation where pictures were submitted as evidence in State court injunction proceeding); *Stark Ceramics, Inc.*, 155 NLRB 1258, 1269 (1965), enfd. 375 F.2d 202 (6th Cir. 1967) (no violation where purpose of picture taking to establish existence of mass picketing and violence in injunction action); but see *Larand Leisurelies, Inc.*, 213 NLRB 197, 207 (1974), enfd. 523 F.2d 814 (6th Cir. 1975) (violation where no pictures were presented in evidence). The Board has likewise found no unlawful surveillance by photographing when done to document trespass by union organizers engaged in handbilling, *Berton Kirshner, Inc.*, 209 NLRB 1081 (1974), enfd. 523 F.2d 1046 (9th Cir. 1975), or to establish that a no-strike clause had been breached to support a petition for injunctive relief. *Roadway Express, Inc.*, 271 NLRB 1238, 1244 (1984). And the Board has held that installation of a rooftop security camera on a retail store did not violate the Act, even though protected concerted activity was recorded, where general security purposes otherwise justified its presence. *Lechmere, Inc.*, 295 NLRB 92, 99–100 (1989), revd. on other grounds 502 U.S. 527 (1992). Otherwise, absent actual violence or mass picketing, the Board has generally condemned employer photographing outright. *Flambeau Plastics Corp.,* supra, 167 NLRB 735, 743 (1967), enfd. 401 F.2d 128 (7th Cir. 1968), cert. denied 393 U.S. 1019 (1969) (rejecting "anticipatory" photographing of picketing "in the event something 'might' happen") Accord: *F. W. Woolworth Co.*, supra, 310 NLRB 1197 (1993); *Waco, Inc.*, supra, 273 NLRB 746, 747 (1984).

[28] 256 NLRB 496, 500–501 (1981).

[29] 323 NLRB 148, 161 (1997).

[30] 311 NLRB 1328, 1336 (1993).

[31] Also see *Electrical Workers IBEW Local 3 (Cablevision)*, 312 NLRB 487 (1993).

[32] Although the Board noted an arguably threatening statement by a union representative in conjunction with the photographing ("We've got it on film; we know who you guys are . . . after the Union wins the election some of you may not be here."), the existence of this evidence was not necessary to the result, as the context of the decision shows that it turned upon "the absence of a valid explanation" for the union conduct. Id.

IV. THE MAJORITY'S DECISION

Against this background, the Board majority would now destroy any remaining consistency and symmetry in regulating photographing of employee activity by employers and unions. Before analyzing the law and reaching a conclusion, the majority's rationale for evaluating similar conduct by employers and unions differently must be examined.

My colleagues argue that *Pepsi-Cola's* general ban, in a preelection setting, on union photographing of employees engaged in protected activity absent a "legitimate explanation" conflicts with precedent "permitting unions to ask employees directly whether they support the union, to attempt to persuade employees to sign petitions in support of representation, and to record the employees' responses," citing *Springfield Hospital*,[33] *Kusan Mfg. Co.*,[34] and *J.C. Penney Food Department*,[35] In *Springfield Hospital* where the Board overruled an employer election objection, we utilized an "all the circumstances" approach to evaluate union conversations with employees about their sentiments and the recording of their responses on charts. The Board ruled there was no showing that these activities "occurred in a context of threats of reprisal or other coercive conduct attributable to the Union or to its supporters."[36] The Board relied on precedent, such as *J.C. Penney Food Department*, supra, upholding "noncoercive" preelection polling, while distinguishing cases like *Graham Engineering*,[37] where coercive conditions were present. The Board similarly emphasized the absence of coercive conduct in overruling an employer objection to union circulation of a prounion petition in *Kusan Mfg.*[38] Thus, as my colleagues acknowledge in their parenthetical descriptions of the holdings of these cases, a union's right to inquire about employees' attitudes toward unionization is limited to noncoercive situations. My colleagues, however, seek to justify applying a per se rule to employer but not union photographing by arguing that "an employer, unlike a union, has virtually absolute control over employees' terms and conditions of employment."[39] Without debating here the holding in *Plant City Welding & Tank Co., Inc.*[40] (barring employer home visits during the critical period preceding an election), relied on by my colleagues, I find *Plant City's* rationale overdrawn insofar as it suggests that unions "lack the relationship with the employees to interfere with their choice of representative thereby."

Section 8(b)(1)(A) of the Act, making it an unfair labor practice to restrain or coerce employees in the exercise of their Section 7 rights, was enacted in 1947 as part of Taft-Hartley Act reforms precisely because of the prevalence of union coercion, including coercion of employees in the course of representational drives. Thus, on April 25, 1947, Senator Ball described the purpose behind the addition of Section 8(b)(1)(A) to the Act: "The sponsors . . . believe that that kind of practice [threats of violence] by unions is in violation of the rights guaranteed to employees in Section 7, *just as it is a violation when an employer directly or indirectly threatens his employees with dismissal if they join a union.*" [Emphasis added.][41]

A little later in the debate, my colleagues' contention was specifically raised and rejected:

> MR. PEPPER. . . . We do not want to make it an unfair labor practice to prevent a man from being beaten up. . . . *Is there not a difference between that case and the case of an employer who has the power of life and death, the power of holding a man's job in his hands*?
>
> MR. TAFT. *I cannot see any difference*. If a man is invited to join a union its members ought to be able to persuade him to join, but if they should not be able to persuade him they should not be permitted

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In *Nu Skin International*, 307 NLRB 223 (1992), however, the Board overruled an employer's objections to union photographing during the critical period preceding the election. There union representatives took some 88 snapshots of employees at a union-sponsored picnic luncheon held during break time the day before election in a parking lot adjacent to the plant. The Board found the picture taking "innocuous and entirely distinguishable" from that in *Pepsi-Cola* and *Mike Yurosek.* Id. at 225. More specifically, the Board noted that attendance was voluntary and that, consistent with an explanation offered at the event, union representatives stated at the hearing that the pictures were made for the union newspaper and for distribution to employees. Id. at 224–255. Pictures were in fact distributed to employees following the election. Id. The Board stressed, however, that the photographing in *Pepsi* and *Mike Yurosek* "might readily suggest retaliatory purpose."

[33] 281 NLRB 643, 692–693 (1986), enfd. 899 F.2d 1305 (2d Cir. 1990).

[34] 267 NLRB 740, 746 (1983), enfd. 749 F.2d 362 (6th Cir. 1984).

[35] 195 NLRB 921 fn. 4 (1972).

[36] 281 NLRB at 693.

[37] 164 NLRB 679, 695 (1967).

[38] 267 NLRB at 746.

[39] Such a statement is rhetoric rather than fact. Individual changes in terms and conditions of employment are subject to administrative and judicial scrutiny, and to assume that an employer can, for example, simply reduce wages broadly at will presupposes that its economic power is unchecked by the employment market in which it hires. Employment monopsonies were rare 50 years ago. H.C. Simons, *Economic Policy for a Free Society* 12 (1948). The market imperfections that allowed unchecked market power did not survive the end of company towns and the rise of worker mobility resulting from increased education, employment agencies, and temp agencies. See Richard H. Leftwich, *The Price System and Resource Allocation* 316–317 (rev. ed 1960). And absent a monopsony, an employer who arbitrarily reduced wages would suffer from the decreased ability to hire or retain workers (unless he was inadvertently paying above the market rate). Thus, although an employer might seem to have "virtually absolute control" over wages and working conditions, the consequences of adverse changes are not free: the employer who attempts to exercise that "control" will suffer the resulting market response.

[40] 119 NLRB 131, 134 (1957), motion granted, 275 F.2d 859 (5th Cir. 1960); remanded 281 F.2d 688 (5th Cir. 1960), revd. on other grounds 133 NLRB 1092 (1961).

[41] II NLRB, *Legislative History of the Labor Management Relations Act*, 1947, at 1018.

> to interfere with him, coerce him, and compel him to join the union. The moment that such a man is threatened with losing his job if he does join, it at once becomes an unfair labor practice. Threats and coercion ought to become unfair labor practices on the part of a union. [Emphasis added.][42]

Stated differently, the Taft-Hartley Congress recognized that employer and union coercion were both evils deserving of proscription, and that the only difference consisted in the means traditionally employed by each side to that end.[43]

Reviewing in 1961, the same legislative history, the Supreme Court concluded:

> Congress added § 8(b)(1)(A) to the Wagner Act, prohibiting, as the Court of Appeals held, ''unions from invading the rights of employees under § 7 in a fashion comparable to the activities of employers prohibited under § 8(a)(1).'' . . . It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights. [Footnote omitted.]

Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB.[44] Similarly, the D.C. Circuit has declared that, "The sponsors of the Taft-Hartley Act, in explaining their proposed legislation, focused primarily on the need to control union violence and economic coercion. . . . [I]t appears that Congress intended Section 8(b)(1)(A) to cover a range of conduct as broad as that covered by Section 8(a)(1)." *Helton v. NLRB*.[45] And the Board early on said: "Th[e] legislative history [of the Taft-Hartley Act] strongly suggests that Congress was interested in eliminating physical violence and intimidation by unions or their representatives, as well as the use by unions of threats of economic action against specific individuals in an effort to compel them to join." *National Maritime Union*.[46] Later, the Board explicitly endorsed the *Helton* court's analysis of the legislative history in *Flatbush Manor Care Center*.[47]

Threats, intimidation, violence, mass picketing, and other such forms of physical coercion are always available to a union seeking to organize employees, whether or not it is ever certified as a bargaining agent.[48] But so is the "economic coercion" referred to in the legislative history.[49] It is another reason why the "union as impotent outsider" theory is misconceived. According to the most recent published statistics, for FY 1998, unions won just over 50 percent of initial representation elections.[50] When a union succeeds in a plant vote, it becomes the employees "exclusive representative," under Section 9(a) of the Act, "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment." This invests the labor organization with wide authority over those whom it represents: "As collective bargaining agents, unions help determine when a man shall work, what he shall do, how much he shall make, when he shall have holidays and the terms on which he shall retire. As exclusive representative, the union alone speaks for him in obtaining these terms, and he can speak only through the union. Even his personal grievances are not free of the union's controlling hand."[51]

The likelihood of misconduct by an incumbent union is such that the Supreme Court and the Board have fashioned a nonstatutory duty of fair representation as a safeguard against hostile or arbitrary actions by a union against those working lives are within its power. "The undoubted broad authority of the union as exclusive bar-

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[42] Id. at 1027. Other pertinent comments from the legislative history include:

SENATOR TAFT: The [Union] leaders who attempt to coerce [employees] may not have anything to do with the plant in which the employees in question work. Sometimes the union has not even gotten into the plant when they begin to coerce employees of the plant. . . . Coercion is not merely against union members; it may be against all employees. Id. at 1030.

SENATOR BALL: [T]he individual employee is very likely to be easily influenced by an hint of coercion on the part of a union organizer . . . . Id. at 1203.

[43] Senator Taft explained:

> [T]he present section [of the Act] against employers has been used by the Board to prevent employers from making threats to employees to prevent them or dissuade them from joining a labor union. They may be threats to fire the man, of course, in the extreme case. They may be threats to reduce his wages, they may be threats to visit some kind of punishment on him within the plant if he undertakes to join a union. Those are the usual types of coercion which have been held to be a violation of the section on the part of the employers. . . . .
>
> In the case of unions, in the first place, there might be a threat that if a man did not join, the union would raise the initiation fee to $300, and he would have to pay $300 to get in; or there might be a threat that if he did not join, the union would get a closed shop agreement and keep him from working at all. Then, there might be a threat of beating up his family or himself if he did not join and sign a card. . . . Id. at 1205.

[44] 366 U.S 731, 738.

[45] 656 F.2d 883, 888 (1981).

[46] 78 NLRB 971, 985 (1948), enfd. 175 F.2d 686 (2d Cir. 1949), cert. denied. 338 U.S. 954 (1949), petition for rehearing denied 339 U.S. 926 (1950).

[47] 287 NLRB 457, 464 (1987).

[48] See, e.g., *Smithers Tire & Automotive of Texas, Inc.,* 308 NLRB 72 (1992) (union agent's threat of physical harm, objectionable)*; Fruehauf Corp.*, 274 NLRB 403, 408–409, 412 (1985) (threat by union business agent to majority of unit employees that anyone crossing a picket line would be shot, grounds for setting aside election).

For an in depth study, see Armand J. Thieblot, Jr. and Thomas R. Haggard, *Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB* (1983).

[49] See, e.g., Senator Taft's comments quoted at fn. 43, supra.

[50] 63 NLRB Ann. Rep. 160 (1998).

[51] Clyde W. Summers, *Union Powers and Workers Rights,* 49 Mich. L. Rev. 805, 815 (1951). Elsewhere in his article, Prof. Summers comments: 'Unions, under the protection and authority of the law, govern the lives of individual workers, controlling their jobs, regulating their conduct, and determining their economic welfare. Unions are the workers economic government, and only through them can individuals have any voice in making the laws under which they work." Id. at 837–838.

gaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation." *Humphrey v. Moore*, 375 U.S. 335, 342 (1964), and authority there cited. "A statutory representative under this Act . . . exercises a grant of powers 'comparable to those possessed by a legislative body' and must, as stated in *Steele v. Louisville & Nashville Railroad Co., et al.*, 323 U.S. 192, 202, 'give equal protection to the interests of those for whom it legislates.'" [citations omitted]. *Miranda Fuel Co.*, 140 NLRB 181, 184–185 (1962), enf. denied, 326 F.2d 172 (2d Cir. 1963).[52]

Thus, during the phase in which a union seeks to acquire exclusive status, the employees of the still unorganized employer are well aware that there is a substantial likelihood that the union will prevail and, cloaked with its power under section 9(a) of the Act, be able to exert considerable authority over employees' daily economic life. Accordingly, nonviolent union threats to take action should it enter the plant are meaningful. A good example is *Mike Yurosek & Son, Inc.*, supra, 292 NLRB 1074, discussed previously, where a union representative taking pictures of campaign activity told an antiunion employee that, "We've got it on film; we know who you guys are . . . after the Union wins the election some of you may not be here."[53]

Nonetheless, my colleagues contend that the Board treats differently employer and union "polling," and should likewise judge photographing by employers and unions by separate standards. As the majority points out, under Board law, an employer poll is prohibited while a representation petition is pending, because such a poll cannot serve a legitimate employer interest in circumstances when an election is scheduled independently to determine employee sentiment. *Struksnes Construction Co.*, 165 NLRB 1062, 1063 (1967). The rule is appropriate because conduct engaged in by an employer that lacks a legitimate purpose would reasonably tend to raise a fear of retaliation in employees' minds.[54]

On the other hand, what is generally referred to as union "polling" is not polling in the same sense. All three court cases relied on by my colleagues involved circulation of union-sponsored petitions among employees calling either for support of the organizing union, *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362 (6th Cir.1984), and *Maremont Corp. v. NLRB*, 161 LRRM 2338 (6th Cir. 1999), or for an early election, *Louis-Allis Co. v. NLRB*, 463 F.2d 512 (7th Cir. 1972). In each case, the court correctly upheld the Board's overruling of employer objections to an election based on the noncoercive nature of the union's conduct in connection with the petitions. I cannot, however, agree with language in these cases, cited by my colleagues, which suggests that the application of different standards of conduct to employers and unions is justified by allegedly greater coercive power wielded by employers over employees. Such a position is irreconcilable with the legislative history and court decisions interpreting it previously recited. Rather, where no coercive circumstances exist, a union's circulation of a petition is just another traditional means of gathering support by persuasion that Congress did not intend to restrict.

The distinction is drawn by the D.C. Circuit, in *Helton v. NLRB*, supra, 656 F.2d at 889, in explaining why the words "interfere with" do not appear in Section 8(b)(1)(A) of the statute, which limits union conduct, as they do in Section 8(a)(1), limiting employer conduct:

> Omission of the words 'interfere with' from Section 8(b)(1)(A) was not intended to indicate that union conduct should be measured against a less demanding standard than employer conduct. The legislation as originally proposed contained these words. They were deleted because it was feared that they would unduly restrict union organization campaigns; they might be ''construed to mean that any conversation, any persuasion, any urging on the part of any person, in an effort to persuade another to join a labor organization, would constitute an unfair labor practice.''

The act of photographing employees during the course of an organizational campaign is not itself an activity that involves persuasion to join a labor organization, and neither photographing on the part of union or an employer should be presumptively illegitimate.

The reliance of my colleagues (and of the *Louis-Allis* court) on the following statement in *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969), is wholly inapposite: "An employer in an unorganized plant, with his almost absolute control over employment, wages, and working conditions, occupies a totally different position in a representation contest than a union, which is merely an outsider seeking entrance to the plant." In *Golden Age*, the court simply upheld the Board's overruling of an employer objection alleging that promises of improved wages, if the union won, warranted setting aside the election. Drawing a distinction between employer and union preelection *promises of benefit* is common

[52] II Hardin, *The Developing Labor Law*, supra at 1442–1471, describes the nature of the duty and its application in various settings.

[53] Also see *Baja's Place, Inc.*, 268 NLRB 868 (1984) (threat by union agent to get employee's job, objectionable); *United Broadcasting Co.,* 248 NLRB 403 (1980) (threat to "blacklist" employee if he did not support union, grounds for setting aside election); *Westside Hospital,* 218 NLRB 96 (1975) (union organizer's threat of deportation to Spanish-speaking employee violative of 8(b)(1)(A) and objectionable): also see *Electronic Components Corp. v. NLRB,* 546 F.2d 1088, 1093 (4th Cir. 1976) (court ordered hearing on objections because, "Employees might have feared that the Union could have them fired if it gained representative status in the future.").

[54] In contrast to casual questioning, "polling" involves "situations where the employer's actions have a broader, more systematic and more deliberate character." *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1360 (D.C. Cir. 1997).

sense, as the Board has long recognized: an unorganized employer has the unilateral ability to change the wages and other terms and conditions of employment of its employees, while a nonincumbent union has no say in such matters.[55] Thus, to the extent that *Golden Age* is invoked to imply that, during an organizational campaign, a union is comparatively powerless to affect employee rights, the argument is misconceived.

In short, neither reality, law, nor logic can support the view that a union is "merely an outsider seeking entrance to the plant," which, in contrast to the employer, lacks the ability to coerce employees and hinder their exercise of rights protected by the Act. Both parties possess the potential for exercising some degree of power over employees, albeit in different forms. The majority, however, has articulated no reasoned basis for creating a "double standard" that presumptively condemns photographing of employees taking part in protected concerted activity by an employer, but not the same conduct undertaken by a union.[56]

V. THE PROPER LEGAL STANDARD

The remaining question is whether photographing should be presumptively deemed unlawful or objectionable when engaged in by each side, or whether an "all the circumstances" approach should be used irrespective of the identity of the party taking the pictures.

The starting point is the general standard for evaluating an allegation of conduct violating Section 8(a)(1). "To establish a violation of section 8(a)(1), the Board's General Counsel must establish that, *under all of the circumstances*, the employer's conduct may reasonably tend to coerce or intimidate employees." [Emphasis added]. *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997).[57] As observed at the outset, unlawful photographing of employees is regarded as a form of surveillance or creation of the impression of surveillance. "The test for determining whether an employer engages in unlawful surveillance, or unlawfully creates the impression of surveillance, is 'an objective one and involves the determination of whether the employer's conduct, *under the circumstances*, was such as would tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 7 of the Act.'" [Emphasis added.] *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932, 938 (4th Cir. 1990). Stated otherwise, "Section 8(a)(1) of the Act does not proscribe all surveillance of employee activities by the employer. The only surveillance, or impression of surveillance, which the Act prohibits is that which tends to interfere with, restrain, or coerce Union activities." [citations omitted.] *NLRB v. Mueller Brass Co.*, 509 F.2d 704, 708 (5th Cir. 1975).

The application of this fact-based approach to a surveillance allegation is illustrated by the court's decision in *NLRB v. Computed Time Corp.*, 587 F.2d 790, 794–795 (5th Cir. 1979). The evidence showed that a low-level supervisor, without the authorization or even knowledge of the company, attended a union organizational meeting. The supervisor learned of the meeting through general leafletting of employees, and a union representative invited him to stay even after he inquired whether his presence at the meeting was illegal. Without other evidence of coercion, the Board found a violation in the underlying case by applying a per se rule: "The presence of management representatives at union functions has an inherent tendency to impede employees in the exercise of their self-organizational rights."[58] The court, however, reversed, and concluded that "the Board did not have evidence establishing coercion sufficient to make out a violation of Section 8(a)(1) of the Act."[59]

The Fifth Circuit's mode of analysis in *Computed Time* was followed in a situation involving photographing as surveillance in *U.S. Steel Corp. v. NLRB*, supra, 682 F.2d 98 (3d Cir. 1982). The Board had applied its usual standard of presumptive illegality in finding a violation: "[I]t is well established that, absent legitimate justification, an employer's photographing of its employees while they are engaged in protected concerted activity constitutes unlawful surveillance."[60] The court rejected the Board's "assum[ption] that, without regard to the particular facts of the case, photographing of pro-

[55] See, e.g., *The Smith Co.*, 192 NLRB 109, 1101 (1971), enfd. in pertinent part in unpublished opinion (9th Cir. Feb. 14, 1974), affd. 200 NLRB 772 (1972), reaffd. 215 NLRB 530 (1974) ("Employees are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining. Union promises of the type involved herein are easily recognized by employees to be dependent on contingencies beyond the Union's control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises or benefits.").

[56] My colleagues' reliance on certain language in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), is misplaced. The Court there referred to a balance that must be drawn between an employer's free speech right and employee Sec. 7 rights, noting that any such balance "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." The Court, as the context of the quotation shows, was endeavoring to provide guidance on when employer *speech* crosses the line separating protected expression under Sec. 8(c) from unlawful threat under Sec. 8(a)(1). The Court was not comparing common means of coercion respectively used by employers and unions, nor addressing, as we are here, the legal significance of similar *conduct* when engaged in by one or the other side.

[57] Accord: *NLRB v. American Chain Link Fence Co.*, 670 F.2d 1236, 1241–1242 (lst Cir. 1981); *Irving Air Chute Co. v. NLRB*, 350 F.2d 176, 178–179 (2d Cir. 1965); *NLRB v. Armcor Industries*, 535 F.2d 239, 242 (3d Cir. 1976); *U.S. Steel Corp. v. NLRB,* supra, 682 F.2d 98, 101 (3d Cir. 1982); *Hendrix Mfg. Co. v. NLRB,* 321 F.2d 100, 105 (5th Cir. 1963).

[58] 228 NLRB 1243, 1245 (1977).

[59] 587 F.2d at 795.

[60] 255 NLRB 1338 (1981).

tected activity constitutes a *per se* violation of section 8(a)(1)":[61]

> [I]t is sufficient, as the Board stated, that the employer's conduct 'may reasonably tend to coerce or intimidate' employees in the exercise of [protected] rights. . . . The Board failed to recognize, however, that it is a reasonable tendency *under the circumstances* which governs the inquiry in each case. Consequently, the Board did not examine the factual setting of this case in reaching its conclusion that petitioner's surveillance was unlawful.[62]

The court in *U.S. Steel* observed that the Fifth Circuit in *Computed Time* had "rejected the Board's *per se* doctrine," and had held that surveillance was unlawful ''because it indicates an employer's opposition to unionization' and leads employees to think they are 'under the threat of economic coercion, retaliation, etc.'" [citations omitted.][63] In *U.S. Steel,* 50–75 union-represented employees took part in a 2-hour demonstration in support of grievances filed involving "the adequacy of locker room facilities made available for their use."[64] The employer used two photographers, who took some 140 pictures, including close-ups of participants, to record the event. Some employees carried picket signs. There was no violence or other illegal activity connected with the event. Nor did the employer discipline any employee, commit any independent unfair labor practice, or take any legal action. The photographing was done on the advice of counsel, and had been undertaken during 13 earlier demonstrations at the plant over the preceding 8 years. In the circumstances, the court found that the employer's conduct did not "reasonably tend to interfere with, restrain, or coerce employees in the exercise of their section 7 rights."[65]

The evidentiary effect of the Board's per se rule has been summarized as follows:[66]

> Where the Board makes out a prima facie case, the burden of going forward with the evidence shifts to the respondent. If the respondent fails to come forward with any evidence, the General Counsel has sustained his burden of proof on the issue. In a case involving alleged photographing of employees' concerted activity . . . . the act of photographing is itself considered to have a tendency to interfere or coerce, and thus violate § 158(a)(1), [thus] there is no requirement that the General Counsel present independent evidence showing that the taking of pictures was done in such a manner as to intimidate or coerce the employees, such as by making intimidating statements to picketers . . . Once the act of photographing of a protected concerted activity has been proved, the burden shifts to the employer to demonstrate a justification for its photographic surveillance . . . ."

In my view, this procedure conflicts with the Board and courts' customary approach, outlined above, in cases involving allegations of 8(a)(1) conduct, of analyzing whether the conduct in question had a reasonable tendency *in the circumstances* to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. The latter inquiry proceeds without according the General Counsel the benefit of a presumption that given conduct has a reasonable tendency to impact employee rights, and compelling the respondent to present contrary evidence.

As outlined in section II,B,2, of this opinion, the Board has historically judged union photographing conduct alleged to violate Section 8(b)(1)(A) under "all the circumstances," rather than starting with a presumption of illegality. *Interstate Cigar*, supra*,* 256 NLRB at 500–501. Utilizing an "all the circumstances" rather than a "*per se*" approach in cases of alleged unlawful photographing is firmly supported by analogy to Board and court cases involving alleged unlawful interrogation of employees. In *Rossmore House*, 269 NLRB 1176, 1176–1177 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (1985), the Board abandoned its per se rule in this area, as described in *Paceco*:[67] "[A]n interrogation of an employee's union sympathies or his reasons for supporting a union need not be uttered in the context of threats or promises in order to be coercive. The probing of such views, even addressed to employees who have openly declared their prounion sympathies, reasonably tends to interfere with the free exercise of employee rights under the Act, and, consequently, is coercive." The Board in *Rossmore House*[68] noted that, in a subsequent case, *PPG Industries*,[69] it had applied the rule even to questioning of "open and active" union adherents. The Board concluded that "*PPG* improperly established a per se rule that completely disregarded the circumstances surrounding an alleged interrogation and ignored the reality of the workplace."[70]

Instead, the Board followed the view of the Seventh Circuit, quoting[71] from the court's opinion in *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1267 (1980), "It is well established that interrogation of employees is not illegal per se. Section 8(a)(1) of the Act prohibits

[61] 682 F.2d at 101.
[62] Id.
[63] Id.
[64] Id. at 99.
[65] Id. at 103.
[66] Russell J. Davis, *Annotation, Photographing of Employees' Concerted Activity as Constituting Unfair Labor Practice Under § 8(a)(1) of the National Labor Relations Act*, 45 A.L.R. Fed. 148, 154 (1979).
[67] 237 NLRB 399, 400 (1978), vacated in part and remanded in part 601 F.2d 180 (5th Cir. 1979), supplemental decision, 247 NLRB 1405 (1980).
[68] 269 NLRB at 1177.
[69] 251 NLRB 1146 (1980).
[70] 269 NLRB at 1177.
[71] Id.

employers only from activity which in some manner tends to restrain, coerce, or interfere with employee rights. To fall within the ambit of § 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference."

In affirming the Board in *Rossmore House*, the Ninth Circuit declared, "A standard which considers the totality of the circumstances surrounding an employee interrogation is a realistic approach to the enforcement of section 8(a)(1). It is a standard that is consistent with the Act because the Board and the administrative law judges can determine, on a case-by-case basis, whether all the facts demonstrate coercive behavior." *Hotel Employees v. NLRB,* 760 F.2d 1006, 1009 (1985). The court's reasoning is sound; I see no justification for not applying it to photographing when, following *Rossmore House*, other forms of conduct that may constitute an 8(a)(1) violation are judged under the same standard.[72]

As with interrogations, however, photographing and videotaping occur in a multiplicity of circumstances. To aid in evaluation of the coercive effect of incidents involving alleged interrogation, the Second Circuit, in 1964, developed a set of widely accepted criteria[73] that became known as the *Bourne* factors:[74]

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality?"
>
> (5) Truthfulness of the reply.

I believe the following standards would be useful in judging whether the circumstances surrounding an act of photographing or videotaping are coercive, either in violation of Section 8(a)(1) or 8(b)(1)(A), or objectionable when done by either an employer or union.

> (1) Whether the photographing occurred in the context of serious independent unfair labor practice conduct or unalleged threats of physical or economic reprisal, intimidation, or actual violence.[75]
>
> (2) Whether the activity photographed was carried on in an open and public way, including whether the activity involved trespass.[76]
>
> (3) Whether the photographing took place at the employer's premises, at the union hall or a union-sponsored event, or at a location unconnected with either party.[77]

[72] As pointed out previously, the Board has at times itself applied the "all the circumstances" standard to photographing. *Sunbelt Mfg., Inc.,* supra, 308 NLRB 780 fn. 2, enfd. in part 996 F.2d 305 (5th Cir. 1993) (table); *Tennessee Packers, Inc.,* supra, 124 NLRB 1117, 1123 (1959); *Hilton Mobile Homes, Inc.,* supra, 155 NLRB 873, 874 (1965), modified on other grounds 387 F.2d 7 (8th Cir. 1967) (table); *F. W. Woolworth Co.*, supra, 310 NLRB 1197, 1198 (1993) (Member Oviatt's dissent); see also *Clock Electric, Inc. v. NLRB* 162 F.3d 907, 919–920 (6th Cir. 1998) (Judge Wellford's dissent); see general cases cited in fn. 57, supra, and accompanying text.

[73] "Virtually every Circuit Court of Appeals has adopted, explicitly or implicitly, the *Bourne* factors and we think that these factors supply the proper starting place for judicial and administrative analysis of whether particular employer questioning was in the totality of circumstances 'coercive' or merely persuasive." *Chauffeurs, Teamsters, and Helpers, Local 633 of New Hampshire*, 509 F.2d 490, 494 (1974). [footnotes omitted]; *Rossmore House,* supra, 269 NLRB at 1178 fn. 20.

[74] *Bourne Co. v. NLRB*, 332 F.2d 47, 48.

[75] See, e.g., *Hudson Hosiery Co.,* supra, 100 NLRB 1410, 1410–1411 (1964) (threat of discharge contemporaneous with photographing of picketing employees); *Preston Feed Corp.* supra, 134 NLRB 629 (1961), enfd. 309 F.2d 346 (4th Cir. 1962) (photographing of pickets on unfair labor practice strike to protest discharge of leading union activist; numerous other illegal acts, including discriminatory subcontracting of unit work); *Larand Leisurelies, Inc.*, 213 NLRB 197 (1974), enfd. 523 F.2d 814 (6th Cir. 1975) (photographing of picketers on unfair labor practice strike; numerous independent violations, including reprimands and threats of discharge to 90 employees); *Mike Yurosek & Son, Inc.,* supra, 292 NLRB 1074 (1989) (union photographing of campaign activity at plant gate; threat to antiunion activist that employees opposed to union "may not be here" after election); *Auto Workers Local 695 (T.B. Wood's Sons Co.)*, supra, 311 NLRB 1328, 1336 (1993) (photographing occupants of vehicles crossing picket line in context of numerous independent 8(b)(1)(A) violations, including mass picketing, threats to rape and kill, and physical assaults); (*Sunbelt Mfg., Inc.,* supra, 308 NLRB 780 (1992), enfd. in part 996 F.2d 305 (5th Cir. 1993) (table) (videotaping of employee organizational handbilling in context of unlawful threats of plant closure and wage reduction and unlawful discharge of union activist); *Dilling Mechanical Corp.,* supra, 318 NLRB 1140 (1995) (photographing of informational and unfair labor practice strike picketers, numerous and serious other unfair labor practices, including threats of discharge and actual discharges).

[76] In a related context, the Board has found no unlawful visual surveillance where employees carry on their protected activities openly. See, e.g., *Roadway Package System, Inc.,* 302 NLRB 961 (1991) (open handbilling outside plant entrance); (*Harry M. Stevens, Inc.,* supra, 277 NLRB 276, 276–277 (1985) (open distribution of union literature in sales area); *Chemtronics, Inc.,* supra, 236 NLRB 178 (1978) (open card solicitation on employer parking lot); see also: *NLRB v. Southern Maryland Hospital Center v. NLRB,* supra, 916 F.2d 932, 939 (4th Cir. 1990) (degree of surveillance irrelevant where employer has right to bar union from premises).

In addition, as noted, in judging whether interactions between management and employees constitute unlawful interrogation, the Board lays particular emphasis on whether the individual subject to questioning is an "open and active" union supporter; if so, the Board is less likely to find an unfair labor practice has been committed. *Rossmore House,* supra, 269 NLRB 1176, 1176–1177 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[77] *Porta Systems Corp.,* 238 NLRB 192 (1978), enfd. 625 F.2d 399 (2d Cir. 1980) ("The Board has held [in visual surveillance cases] that '[u]nion representatives and employees who choose to engage in their union activities at the Employer's premises should have no cause to complain that management observes them.'" [Footnote omitted.]

(4) Whether the photographing was done in a "conspicuous" manner that would suggest it was intended as a prelude to reprisal.[78]

(5) Whether the party photographing the activity had a "legitimate" or "proper" justification as previously recognized by the Board.[79]

What the D.C. Circuit has said of the *Bourne* standards applies equally to these criteria: "Determining whether employee questioning violates the Act does not require strict evaluation of each factor; instead [t]he flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the totality of the circumstance." *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (1998) (internal quotation marks omitted), quoting *Timsco, Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987).

In many if not most cases alleging unlawful or objectionable photographing or videotaping, application of "*Randell*" factors will not result in an outcome different than under the per se rule, either because analysis will point to the presence of coercive circumstances, or because the party's justification would be valid even within existing precedent. But the "all the circumstances" approach is inconsistent with cases like *Waco, Inc.*, supra, 273 NLRB 746 (1984), applying the principle that photographing in anticipation of possible misconduct is unlawful irrespective of the context. In *Waco*, the employer on a single occasion photographed picketing by several discharged employees and two nonemployees. The Board found the employer had committed two other relatively minor unfair labor practices.[80] The picketing was carried on openly near the plant entrance. There was no evidence the photographing was "conspicuous," but neither does it appear that any justification for it was given. The judge, whom the Board reversed for not applying the per se rule against photographing, found that, "At no time were the pickets asked to move. Nor were they threatened, arrested, or otherwise interfered with." Id. at 753. The first four *Randell* standards thus favor finding no reasonably tendency to coerce employees; the fifth leans in the opposite direction. Accordingly, like the judge and contrary to the Board in *Waco*, I would find no violation of the Act in such circumstances.

Likewise, *Pepsi-Cola Bottling Co.,* supra, 289 NLRB 736, which used the per se approach in the context of objections filed against a union, would require a different result. In *Pepsi*, as noted, during a 2-hour union rally staged the day before the election in front of the Employer's plant, union representatives videotaped employees as they were offered union leaflets when leaving the plant in their vehicles. Without any evidence of threats, intimidation, violence, or other coercive conduct, the Board found that "employees could reasonably believe that the Union was contemplating some future reprisals against them," and sustained the employer's objection. Id. I cannot agree that this is a valid inference to be drawn from the mere act of videotaping employees being offered union literature, and I would have overruled the objection. There were no independent unfair labor practices or threats; the activity photographed was open and public. The photographing was not "conspicuous." The location, near the employer's facility entrance, is not significant in the circumstances. Only failure to provide a "legitimate justification" for the act tends toward finding the photographing coercive; standing alone, however, it is insufficient. As stated, I would reverse *Pepsi* and abandon the per se test as applied to union as well as employer photographing and videotaping.[81]

Similarly, in the instant case, I would reverse the hearing officer where the evidence shows no more than that a union agent took pictures of employees leaving the employer's facility and being offered flyers by other union representatives. The *Randell* factors line up the same way they do in *Pepsi-Cola.* I can find nothing coercive or sinister in one leafletter's reply, when asked by an employee why pictures were being taken: "It's for the Union purpose, showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run."

In all cases, the burden should be on the General Counsel or the objecting party to make a prima facie case of coercive conduct, without use of presumptions. The ultimate question should be whether the conduct, in the circumstances, may reasonably tend to instill in the minds of the employees photographed a fear of economic or physical reprisal.

CONCLUSION

For the reasons set out above, I am persuaded that an "all the circumstances" approach in this area is more consonant with the Board and courts' traditional method of analysis in Section 8(a)(1) cases. And it is consistent with the way the Board has treated Section 8(b)(1)(A) cases involving photographing.

In candor, I cannot assert that using a rule that condemns photographing or videotaping, unless accompanied by a "legitimate" or "proper" justification, is an inadmissible interpretation under the Act, if applied to both

[78] *Udylite Corp.,* 183 NLRB 163, 172–173 (1970), enf. denied in part and remanded on other grounds 455 F.2d 1357 (D.C. Cir. 1971); *Rainbow Garment Contracting,* 314 NLRB 929, 931, 936–937. (1994)

[79] See discussion of cases in fn. 27, supra.

[80] The 8(a)(1) violations included admonishing employees, unaccompanied by threats to discipline or discharge, not to discuss their wages among themselves, and requiring an employee to remove a union sign from the wall outside the plant lunchroom where it had permitted the posting of other notices.

[81] As previously observed, the Board apparently has applied the "in the circumstances" standard to union photographing where a violation of Sec. 8(b)(1)(A) is alleged, while, heretofore using the per se approach to objections alleging election interference by such conduct.

employer and union conduct and to both unfair labor practice proceedings and representation proceedings.[82] But what I do not find defensible, as discussed, is the Board's fashioning of a blatant "double standard" under which employer photographing or videotaping is judged as presumptively unlawful or objectionable, while similar union conduct is evaluated "under the circumstances." It is this aspect of my colleagues' decision that is most likely to invite skeptical scrutiny from reviewing courts.[83]

Thus, the D.C. Circuit recently reversed the Board where it had overruled an employer's objection alleging that the petitioning union had interfered with an election by granting a benefit to employees. *Freund Baking Co. v. NLRB*, 165 F.3d 928 (1999). In *Freund*, the day before the voting, the union announced to employees the filing, on their behalf, of a class action lawsuit seeking back wages from the employer for violation of state overtime requirements. The court observed that, "Just as the Act prohibits an employer from using threats or rewards as campaign tactics, it bars both crude and subtle forms of vote-buying on the part of the union." Id. at 931. The court stated that the union's "sponsorship of the employees lawsuit against the Company clearly violated the rule against providing gratuities, and that, "[T]he Board's justifications for making an exception to the anti-gratuity rule for a union's provision of legal services is not based upon any reasonably defensible construction of the Act." Id. at 935.

Likewise, as regards making findings of supervisory status that tend to improperly favor the position of labor organizations, the Second Circuit, among other courts, has been critical: "[T]he Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions in this area." [citations from other circuits omitted]. *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 492 (2d Cir. 1997); *New York University Medical Center v. NLRB*, 156 F.3d 405, 412 (2d Cir. 1998) Also see *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333, 339 fn. 8 (4th Cir. 1998).

We would be wise to recall the words of Judge van Graafeiland, in his separate opinion in *NLRB v. Porta Systems, Inc.*, 625 F.2d 399, 405 (2d Cir. 1980): "The Board is obligated to administer the Labor Management Relations Act fairly and rationally and to act as an impartial and neutral referee, guarding the rights of both employer and employee. It should not act arbitrarily, nor 'treat similar situations in dissimilar ways.'" [Footnotes omitted.] Accord: *Aramark Corp. v. NLRB*, Nos. 97–9535, –9550, slip op. at 23 (10th Cir. May 28, 1999); *Burinskas v. NLRB*, 357 F.2d 822, 827 (D.C. Cir. 1966).

The Supreme Court has also recently reminded us that "adjudication is subject to the requirements of reasoned decisionmaking." *Allentown Mack Sales & Service NLRB*, 522 U.S. 359, 374 (1998).

Because the legislative history of the Act demonstrates that Congress was equally concerned with coercion and intimidation of employees, economic and physical, whether practiced by employers or labor organizations, I cannot join my colleagues in fashioning a rule that would judge comparable factual situations differently. Whether a case involves photographing or videotaping by an employer or a union, rather than applying dubious presumptions, I would evaluate the actual evidence in light of all the circumstances to gauge its impact on employee rights. And I would apply the same yardstick to the facts in either situation. Because I find the union's photographing of employees did not reasonably tend to interfere with their right to a free and uncoerced choice in the election, Petitioner should be certified.

MEMBER HURTGEN, dissenting.

My colleagues have overruled established Board precedent, and they have reversed the considered judgment of the hearing officer. I would do neither.

Under established precedent, unions engage in objectionable conduct when they photograph employees who are engaged in Section 7 activity, absent a legitimate explanation given to the employees.[1] My colleagues offer no empirical justification for this overruling of precedent. I would uphold the precedent.

The hearing officer applied this established precedent, and found objectionable conduct. My colleagues offer no evidentiary basis for reversing the hearing officer. I would affirm.

More particularly, the Union engaged in objectionable conduct by photographing employees (leaving the plant) as they were being offered literature by union representatives. The Union's activity permitted it to record permanently whether or not employees accepted the Union's materials. In these circumstances, employees would reasonably fear that this permanent record could be used against them in the future. Accordingly, such conduct is objectionable.

It is clear that the Union did not adequately explain its photographing of employees. Indeed, the explanation, such as it was, was offered to only one employee and was simply as follows:

[82] I am of course not unaware that several courts of appeal have deferred to the Board's application of the presumptive rule of illegality in cases involving employer photographing or videotaping. See *National Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268 (D.C. Cir. 1998); *Road Sprinkler Fitters Union (John Cuneo, Inc.)*, 681 F.2d 11 (D.C. Cir. 1982); *Clock Electric, Inc.,* supra, 162 F.3d 907, 917–918 (6th Cir. 1998); *NLRB v. Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 819 (6th Cir. 1975); *NLRB v. Colonial Haven Nursing Home,*, 542 F.2d 691, 700–703 (7th Cir. 1976); *California Acrylic Industries,. v. NLRB*, 150 F.3d 1095, 1098–1100 (9th Cir. 1998); *Kallmann v. NLRB*, 640 F.2d 1094, 1098 fn. 5 (9th Cir. 1981).

[83] Note the Supreme Court's rejection of using a per se rule and a rule of reason to judge comparable types of conduct. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57–59 (1977).

[1] *Pepsi-Cola*, 289 NLRB 736 (1988).

> It's for the Union purpose, showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run.

In my view, the words "It's for the Union purpose" would raise a reasonable concern in an employee's mind about what that union purpose was and how a permanent record of employee reaction would be utilized for that purpose. Thus, as in *Mike Yurosek & Son, Inc.*, 292 NLRB 1074 (1989), the photographing was accompanied by a statement that can reasonably be regarded as intimidating.[2]

Further, even if the statement is not intimidating, it is an ambiguous message that explains little.[3] Thus, it does not meet the test of *Pepsi-Cola*. As noted, that case teaches that photographing of Section 7 activity is lawful only if an adequate explanation is given. The muddled message here is not adequate.[4]

My colleagues are apparently aware that the explanation was inadequate. Accordingly, they overrule *Pepsi-Cola*. I would not do so.

In support of their overruling of *Pepsi Cola*, my colleagues rely on *Springfield Hospital*, 281 NLRB 643, 692–693 (1986). The case is clearly distinguishable. In that case, prounion employees sought to engage other employees in conversations about the union. Based on those conversations, the union kept a list of employee sentiments about the union. The Board found the conduct nonobjectionable.[5]

Clearly, there is a difference between the *Springfield* conduct and the photographing conduct in the instant case. As the familiar quotation states: "one picture is worth a thousand words."[6] That is, an employee may be able to deny that his conversational words were antiunion, but the employee cannot deny what a picture graphically shows, i.e., a rejection of a prounion leaflet. Likewise, if employees are asked in a conversation about their union sentiments, they can decline the conversational gambit, and thus no record will be made of pro or con sentiments. But if a union leaflet is given to an employee, the employee must either accept or reject it. It is reasonable for an employee to fear that the photographing of the incident will create a graphic and permanent record of that choice. In short, a photographic record of the incident, without employee consent, can have an intimidating effect.

Similarly, asking an employee to sign an authorization card is different from the conduct involved herein. A union solicitor will necessarily explain the purpose of the solicitation. By contrast, the photographing herein was without explanation or, at best, involved an ambiguous explanation.

The result reached by my colleagues is in contrast to that reached in cases where employers have photographed employees. The Board imposes on employers (as it does on unions) the burden of justifying their photographing of protected activity.[7] Here, the only justification was the "explanation" discussed above. As noted, that explanation was ambiguous, and it was offered to only one employee. In these circumstances, that explanation is hardly the "solid justification" required by the Board and courts. See *F. W. Woolworth*, supra, quoting *NLRB v. Colonial Haven*, 542 F.2d 692 201 (7th Cir. 1976).

My colleagues suggest that employer conduct should be subject to a more stringent standard because employers have direct control over terms and conditions of employment. Because of that control, employer polling of employees may be subject to a more stringent standard than union polling of employees. Similarly, because of such control, and because employers can readily assemble employees at the workplace, employers cannot generally visit homes of individual employees, while unions can do so. However, these principle have nothing to do with this case. This case involves photographing of employees, not the manipulation, or threatened manipulation, of employment terms.[8] While unions may lack direct control over employment terms, this is not to say that unions are without means of retaliation. For example, unions have the power to threaten, or engage in, physical harm. Further, if a union becomes the Section 9 representative, it has the exclusive power to represent the employees. Thus, in many ways, a union can affect employees, just as in other ways an employer can do so. The issue is whether the Union's conduct is threatening, not whether it is as threatening as an employer's conduct might be. Where a union photographs employees as they refrain from union activity, and offers no benign explanation for that conduct, I believe that employees could

[2] By contrast, in *Nu Skin International*, 307 NLRB 223 (1992), the union gave an innocent explanation for the photographing. Further, the photographing occurred at a union picnic that was voluntarily attended by employees.

[3] Even my colleagues concede that it is "not wholly free from ambiguity."

[4] My colleagues go to some lengths to say that unions have legitimate reasons for photographing employees. My colleagues thereby miss my point. I am not suggesting that unions cannot photograph employees. I merely say that the Union here did not do what extant law requires, viz., give a legitimate explanation of its photographing.

[5] It does not appear that the enforcing court in *Springfield* dealt with the photographing issues involved herein. 899 F.2d 1305.

[6] See *Bartlett's Familiar Quotations*, p. 782 (16th Edition 1993).

[7] In the cases involving employer photographing, "the Board has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate." *F. W. Woolworth*, 310 NLRB 1194 (1993).

[8] Where the conduct involves a promise to improve wages, there may be a distinction between employer and union promises, inasmuch as the employer is the ultimate determiner of wages. See *NLRB v. Golden Age*, 415 F.2d 26 (5th Cir. 1969) (union promise of improved wages held nonobjectionable). However, that is not the issue in this case.

reasonably be concerned that a photographic record is being kept for a non-benign purpose.

Finally, my colleagues rely on *Lechmere* in support of their view that the Union's conduct herein (photographing employees) was not objectionable. Clearly, *Lechmere* holds no such thing. *Lechmere* does not involve the photographing of employees. Nor does it involve alleged objectionable conduct by a union. Rather, it involves whether an employer commits an unfair labor practice by ousting union agents from its property. The Court held that there was no unfair labor practice. It is at least a reach (if not a grasping at straws) to say that *Lechmere* supports the majority in this case.

Member Brame's concurring opinion

As noted above, this case involves the issue of whether the Union's photographing of employees engaged in Section 7 activity constituted objectionable conduct. I agree with Member Brame that the issue of whether photographing is objectionable should be judged by a uniform standard, irrespective of whether the photographing is by a union or an employer. Further, that standard should not be a per se standard, either for employer or union conduct. For example, the issue of legality turns on such factors as: (1) whether the photographs were taken of employees who were engaged in a Section 7 exercise (.e., accepting or rejecting a union or employer pamphlet); (2) the context of the photographing (e.g., a union picnic which employees voluntarily attend; see fn. 2, supra); and (3) the clarity of the explanation of the purpose of the photographing.

However, I do not pass on the broader issues raised by Member Brame. Simply put, resolution of those issues is not necessary to the disposition of this case. More particularly, we are not faced with the *unfair labor practice* issue of whether employer conduct under Section 8(a)(1) is to be judged under the same standards as union conduct under Section 8(b)(1)(A).[9] Finally, for the reasons set forth above, I would apply extant law to the instant objection case. Under the extant law, I have concluded, contrary to Member Brame, that the Union's conduct was objectionable.

Based on all of the above, and on Board precedent, I would set aside the election.

APPENDIX

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOTS AND OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

Pursuant to a Stipulated Election Agreement, approved by the Regional Director for Region 28 on December 21, 1994, an election by secret ballot was conducted on February 3, 1995,[1] by an agent of the National Labor Relations Board among the employees in the unit agreed appropriate by the parties for the purpose of collective bargaining.[2] The tally of ballots served on all parties at the conclusion of the election showed the following results:

Approximate number of eligible voters	73
Void ballots	0
Votes cast for Petitioner	40
Votes cast against participating Labor Organization	32
Valid votes counted	72
Challenged ballots	25
Valid votes counted plus challenged ballot	97

Challenges were sufficient in number to affect the results of the elections.

The Employer filed timely objections to the election.

The Regional Director found that the challenged ballots and the Employer's objections raised substantial and material issues of fact and credibility which could best be resolved by a hearing. On February 28, the Regional Director, pursuant to Section 102.69 of the Board's Rules and Regulations, issued and caused to be served on the parties an order directing hearing and notice of hearing directing that a hearing be held before a hearing officer for the purpose of resolving the issues raised by the challenged ballots and the Employer's objections. The designated hearing officer was directed to prepare and cause to be served on the parties a report containing resolutions of credibility of the witnesses, findings of fact, and recommendations to the Board as to the disposition of the challenged ballots and the Employer's objections.

Pursuant to the Regional Director's Order, a hearing was conducted in Tucson, Arizona, on March 9 and 10, by me. All parties to the proceeding appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, and to make closing oral arguments at the hearing or to file written briefs with the hearing officer. Counsel for the Petitioner (the Union) argued orally at the close of the hearing and counsel for the Employer filed a written brief after the close of the hearing.

On the entire record in this case, including my careful consideration of the arguments of counsel, a reconciliation of conflicts of testimony, whenever necessary, and based on my observation of the attitude and demeanor of the witnesses presented by each party, and an assessment of the inherent probability of their testimony, which form the basis for my credibility conclusions, I make the following findings of fact, conclusions and recommendations to the Board.

The Challenged Ballots

At the election the Board agent conducting the election challenged the ballots of the following 24 named individuals because their names did not appear on the voter eligibility list:

[9] Without passing on this issue, I note that the language of Sec. 8(a)(1) (interferes with, restrain, or coerce) is broader than the language of Sec. 8(b)(1)(A) (restrain or coerce). I also note that the "laboratory standard" for election objection cases is not necessarily the same as the standard for unfair labor practice cases.

[1] All dates hereinafter refer to year 1995 unless otherwise indicated.

[2] All probationary employees beginning 90 consecutive calendar days after being hired by Randell and all regular employees who are assemblers, janitors, hourly maintenance, shippers and craters, stampers and shearers and warehouse persons employed by the Employer in Tucson, Arizona; excluding all supervisors, employees occupying positions of a labor relations confidential nature, salaried employees, temporary employees, employees designated as managerial trainees, secretaries and office clerical employees, guards, managers, administrators and executives.

Manilo Baez	James Munoz
Manuel Gonzalez	Donald Campbell
Adalberto Gracia	Manuel Siqueros
Jose Coroado	Miguel Sosa
Sergio Martinez	Tomas Venegas
Miguel Miranda	Gustavo Warres
Frank Mendoas	Bill Lockey
Jose Osuna	Hector Mena
Adrian Perez	Adalberto Coloris
Edin Reynosa	Robin Westerbur
Jose Roma	Ramon Soqui
Agustin Ruiz	Jesus Wilkerson

At the hearing, the parties stipulated that the 24 named individuals were not eligible to vote in the election and that the challenges to their ballots should be sustained, and that their ballots should not be counted.

Based on the stipulation of the parties, I recommend to the Board that the challenges to the ballots of the 24 named individuals be sustained and that their votes not be counted.

The Board agent conducting the election also challenged the ballot of Francisco G. Ochoa when he appeared to vote, because the election observers had mistakenly allowed Francisco J. Ochoa to vote. Francisco J. Ochoa's name, however, was not listed on the eligibility list used by the observers to check off voters.

At the hearing no evidence was presented concerning the eligibility of either Francisco G. Ochoa or Francisco J. Ochoa. Because of the disposition of the 24 challenges, however, their eligibility is immaterial since a difference of 2 votes could no longer affect the outcome of a revised tally reflecting the deletion of 24 challenged ballots.

I, therefore, recommend that the Board issue a revised tally of ballots which will reflect the following results:

Approximate number of eligible voters	73
Void ballots	0
Votes cast for Petitioner	40
Votes cast against participating Labor Organization	32
Valid votes counted	72
Challenged ballots	1
Valid votes counted plus challenged ballot	73

Challenges are insufficient to affect the results of the election.

The Objections

The Employer filed timely objections "based on conduct of the Board Agent who conducted the election and of adherents and agents of Sheetmetal Workers' International Association, Local No. 359, AFL–CIO which affected both the conduct of the election process and the results of the election."

The objections enumerated three broad areas of specific and general allegations of interference with employees' free and unfettered exercise of their statutorily granted franchise. The following are the three enumerated areas comprising the objections:

1. The Board Agent conducting the election failed to maintain control of the area where the balloting was held, by inter alia, permitting electioneering and by permitting an individual, not listed in the eligibility list to vote unchallenged, while challenging another individual who was included in said list. The failure of the Board Agent to maintain control and supervise the area where the balloting took place resulted in the unjustified presence of persons in the area. Those irregularities in the course of the election process affected its outcome.
2. Numerous acts of intimidation, including threats and implied threats by Union adherents and agents directed to eligible voters occurred prior to and during the day of the election. Such acts and threats created an atmosphere of coercion and intimidation which, reasonably, tended to interfere with the free and uncoerced choice of the employees.
3. Other acts of interference, restraint and coercion by Union adherents and agents which affected the results of the election.

The claimed improprieties at the balloting

The election was held in the Employer's cafeteria and was conducted for the Board by Board Agent Cynthia Spurlock. Each party was represented by two observers. The Union's observers were leadworkers Pepe Valenzuela and Rudy Olvera. No objection was raised by the Employer to the Union's designation and use of the two leadworkers as election observers.

The immediate voting area itself was enclosed by a blue plastic translucent curtain which contained a triangular vertical opening for access by voters to the voting place. Voters arrived in groups of from 4 to 12, and were admitted into the voting place as it could accommodate them, after they waited in line along the plastic curtain adjacent to the opening. During the polling hours, machinery running nearby created a noisy environment. In addition, the employees waiting to vote engaged in talking and "chit chat" that was carried on in Spanish. The Board agent requested on several occasions that the observers ask the waiting voters to stop their talking. The Board agent herself also asked for the talking to stop.

There was no evidence as to the actual content of the conversations, nor that electioneering was being engaged in by anyone waiting to vote. Although one might hope that voters in an NLRB election would maintain an attitude suitable to the solemnity of a religious service, "chit chat" in the voting line that is not disruptive enough to create a distracting atmosphere, cannot serve to warrant setting aside the results of an election.

The Regional Director, in his Order of February 28, stated that the election observers had mistakenly allowed Francisco J. Ochoa, whose name did not appear on the eligibility list, to vote an unchallenged ballot. Because of the error, the Regional Director stated that the Board agent thereafter challenged the ballot of Francisco G. Ochoa. The Employer contended in its objections that this irregularity affected the outcome of the election. No evidence, however, was presented at the hearing in support of this contention. Nor was any nonhearsay evidence presented regarding the challenge to the ballot of Francisco G. Ochoa, presumably because it was unnecessary to do so in light of the parties' stipulation with respect to the remaining 24 challenged ballots.

Johnny Vielma, one of the Employer's observers, testified that during the balloting, union observer Pepe Velazquez made a hand signal to a voter by rubbing his index finger across his forehead, then his nose and finally his chin. There was no explanation of what those cryptic gestures by Velazquez were meant to convey, if anything. Although the election was held on February 3, a wintertime date, Velazquez might have been wiping perspiration from his face, or signaling that someone bring him a hat, a handkerchief, and a scarf. Without more, I

am not prepared to speculate that Velazquez was engaged in improper electioneering when he was seen rubbing his index finger on various parts of his face. Velazquez' physiognomy is beyond my powers.

I find that the balloting was conducted with requisite decorum, and that the Employer's contention, that the election be set aside because of irregularities at the polling place, lacks merit. I, therefore, recommend to the Board that this aspect of the Employer's objections be overruled.

The Employer also contended that the election should be set aside because of the use by the Union of leadworkers as election observers. I disagree, and will explain my rationale in the following part of this report.

2. The claimed acts of intimidation, including threats, and implied threats

The Employer's objections did not specifically allege that the election was interfered with by the prounion activities of the Employer's leadworkers. At the hearing, however, it became obvious that the Employer, in presenting its evidence, was attempting to establish that the leadworkers possessed supervisory authority and engaged openly in prounion activities, including wearing hats and shirts containing the union logo and wearing "Vote Yes" tags. Additionally, leadworkers Pepe Velazquez and Rudy Olvera acted for the Union as observers at the election. In its posthearing brief, the Employer expounds a full blown argument that the evidence established that the leadworkers were either supervisors within the meaning of Section 2(11) of the Act or managerial employees under Board and court decisions. Although not stated in its brief, it almost appears that the Employer is attempting to make a postelection challenge to the eligibility of the leadworkers. Of course, the Board will not permit challenges in the guise of "objections" after the election. *NLRB v. A. J. Tower Co*., 329 U.S. 324 (1946); NLRB Field Manual 11360.

The leadworkers appeared on the eligibility list prepared by the Employer and apparently voted without challenge. There is no evidence of any claim that they were not included in the agreed to unit as a result of any preagreement discussion. Vicky Rynda, the Employer's office manager and human resources assistant, testified that leadworkers were placed on the eligibility list by the Employer. She testified that leadworkers began wearing union hats a month or two before the election and continued wearing them openly and without hindrance at least up to the date of the election. The Employer put out no instructions prohibiting the wearing of union apparel by leadworkers, and leadworkers were given no instructions by the Employer concerning refraining from engaging in activities on behalf of the Union. Rynda attended the preelection conference at which the parties designated their observers. She testified that the Employer registered no objections to the Union's selection of leadworkers Valenzuela and Olvera as its election observers.

At the hearing, the Employer presented evidence of job duties and responsibilities exercised by leadworkers that pointed toward a prima facie showing of supervisory status. In the setting of this procedure I am not prepared to recommend that the Board find that the leadworkers are supervisors within the meaning of the Act or managerial employees.[3] Their status as participants in the election seems to have been agreed to by both parties, at least by the time the election agreement was executed and approved. The Employer's belated contorted assertions amount to nothing more than a post-hoc bootstrap contention that I reject and recommend that the Board reject.

It has been consistently and long held by both the Board and the courts, that where established supervisors are also part of the bargaining unit, affirmative participation by an employer in the activity involving the union must be found to support a claim of coercion.

When an established supervisor is included in the unit by agreement of a union and an employer and is permitted to vote in an election, the employees obviously regard him/her as one of themselves. Statements made by such a supervisor are not considered by employees to be the representations of management, but of a fellow employee. Thus, they do not tend to intimidate employees. *Montgomery Ward & Co*., 115 NLRB 645. 647 (1956); *Hy Plains Dressed Beef, Inc.*, 146 NLRB 1253, 1254 (1964); *Nazareth Regional High School v. NLRB,* 549 F.2d 873, 883 (2d Cir. 1977).

The Employer here is trying to make leadworkers unwitting agents of its own power and authority in order to take advantage of a situation that it allowed to develop without constraint. Simple elemental fairness cannot allow such a result. I, therefore, recommend that this portion of the Employer's objections be overruled.

The alleged threats

Employee Carlos Velazquez testified that about a week before the election, he wore a blue tag on his clothing on which the phrase "Randall, Vote No" appeared. Two fellow employees, who displayed prounion emblems on their persons, told Velazquez to take off the Vote No tag. One of the two, Jesus Gallegos, told Velazquez that Velazquez was looking for problems. The other, Guillermo Celaya, only told him to take off the tag. Velazquez responded that he had a right to wear the badge if he wanted to.

Velazquez testified that on the same day, after work, as he was driving home, he was chased by Gallegos and Celaya who were driving two separate vehicles. Velazquez testified to a harassing ride in which Gallegos and Celaya harassed him by boxing him in, speeding, and slowing, and attempting to force him off the road.

Gallegos and Celaya both credibly denied the account of the incident as testified to by Velazquez. Gallegos testified that he had not been involved in any incident with vehicles that involved Velazquez. Celaya testified to a minor situation where it was Velazquez who cut suddenly into a lane of traffic in which Celaya was approaching, which caused Celaya to slam on his brakes to avoid hitting Velazquez' car. Two other credible witnesses, Luis LaMadrid and Edwardo Lopez, corroborated Celaya's account of his involvement with Velazquez and a driving incident.

Nevertheless, a rumor circulated throughout the plant that Carlos Velazquez had been almost forced off the road while driving home from work. After hearing about the incident, Velazquez' leadman, Pepe Valenzuela, told Velazquez "You have to be careful, you don't know what they are doing, they are crazy."

The Employer conducted a series of meetings of small groups of employees before the election. At these meetings, which were conducted by consultants employed by the Employer, the Employer's position on the election and unions was

[3] It seems to me that by no stretch, even if relevant, could *NLRB v. Yeshiva University,* 444 U.S. 672 (1980), be applied to the leadworkers in this case.

presented. A videotape about union strikes was shown at the meetings. The video showed the negative aspects of having a union at the Employer. Employee Ray Encinas, who outwardly supported the Union, attended two of these meetings. Both Plant Manager John Halifax and Gerardo Martinez attended the meetings at which Encinas was present. At one of the meetings an employee questioned what would happen if there was a strike and some employees crossed the picket line. According to the testimony of Manager Gerardo Martinez, Encinas responded "that they would bring somebody from down below to take care of those people." Neither the consultants nor the employer managers made any reply to Encinas' comment and the meeting ended.

At the second meeting that Encinas attended an employee asked what would happen to those people who did not want to become members if the Union was voted in. Manager Martinez testified that Encinas said that "they would have the Chico Mafia take care of those people" Again, neither the consultants nor the employer managers made any reply to Encinas' comments, and the transcript is silent with respect to whether there was any laughter generated by Encinas' comment.

Finally, employee Johnny Vielma testified that he was wearing a "Vote No" tag on his shirt and leadworker Pepe Valenzuela, pointing to the tag, said that "there is people here that beat up people that wear that."

None of the individuals who were alleged to have engaged in unlawful threats and other misconduct affecting the results of the election were shown to have been union officers, representatives, or agents. In fact, the Employer attempted to show that leadworkers were its own agents, either as supervisors or managerial employees. Viewing the activities of those individuals, there is no evidence that their status was other than that of strong union adherents, at most. It is not uncommon for strong feeling to be generated during a union organizational campaign and for employees to line up in prounion and antiunion groups. The creation of such groups does not a fortiori lead to the conclusion that the activities of such groups are attributable to either party. As here where the conduct complained of is not instigated, authorized, solicited, ratified, condoned, or adopted by the Union, the Union cannot be held accountable for such conduct. *Gabriel Co.,* 137 NLRB 1252, 1267 (1962); *Bronze Alloys Co*., 120 NLRB 682 (1958).

In determining whether to set aside an election based on the activities of persons other than the parties, the Board accords less weight to such conduct than to conduct of the parties. The Board believes that the conduct of third persons and rank-and-file employees tends to have less effect on the voters than similar conduct attributable to the Employer who has, or the Union which seeks, control over the employees' working conditions. *Orleans Mfg. Co*., 120 NLRB 630 (1958). The conduct, however, of rank-and-file union adherents is not completely immunized from restraint and the Board has held that conduct that creates such confusion and fear of reprisal, as to interfere with a free and untrammeled choice of representatives in an election, will form the basis for setting the election aside. *Poinsett Lumber & Mfg. Co*., 116 NLRB 1732 (1956).

Although threats of retaliation or physical violence whether expressly stated or indirectly inferable are not to be condoned, the Board will not attempt to police the unrestrained activities which sometimes regrettably appear in heated union elections. I do not view the remarks of the employees outlined above as serious enough to form the basis for setting aside the election. Nor do I find that an atmosphere of confusion of fear was created in which a free and fair election could not have been held. I, therefore, recommend that this portion of the Employer's objections be overruled by the Board.

Photographing employees

The parties stipulated that prior to the election, union representatives took photographic pictures of union representatives distributing union literature outside of the Employer's plant. Several employees testified, that a person with a camera aimed the camera at their persons or their vehicles when they were exiting the Employer's property while other individuals were distributing union flyers. There is no evidence that the Union ever communicated to employees the reason for the use of a photographic camera at those times. Employee Carlos Velazquez testified that he asked one of the individuals distributing flyers why the other person was taking pictures. Velazquez testified that he was told:

> It's for the Union purpose, showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run.

This not so clear explanation is hardly enough to comfort someone that the photographs might not be used for some other, possibly devious, purpose.

The Board has held that, in the absence of a valid explanation, photographing employees by a union, amounts to objectionable conduct. *Mike Yurosek & Son, Inc.,* 292 NLRB 1074 (1989). The Board has also found that the unexplained videotaping of employees as they exited the employer's plant and were handed union leaflets warranted the setting aside of an election and directing a new one. *Pepsi-Cola Bottling Co. of Los Angeles,* 289 NLRB 736 (1988*).* The Board found in *Pepsi-Cola:*

> Absent any legitimate explanation from the Union, we find that employees could reasonably believe that the Union was contemplating some future reprisals against them. Clearly, such conduct would be intimidating and would reasonably tend to interfere with employee free choice in the election.

Based on the above, I recommend that the Employer's objection based on the photographing of employees be sustained, that the election held on February 3 be set aside, and that a new election be directed by the Board.

Filing of exceptions

Within 14 days from the date of issuance of this report, either party may file an original and seven copies of exceptions thereto with the Board in Washington, D.C. Immediately on the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director and the hearing officer. If no such exceptions are filed, the Board will adopt the recommendations of the hearing officer.